ZAINAL ABIDIN PUTIH & ANOR.

v.

CHE WAN DVPT. SDN. BHD.

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
GUNN CHIT TUAN SCJ
ANUAR ZAINAL ABIDIN J
[CIVIL APPEAL NO. 02-45-91]
22 MAY 1992

STATUTORY INTERPRETATION: *Regulation 13 of Essential (Protection of Depositors) Regulations 1986 - Priority claims - Assets of CCB - Whether respondent's costs should be paid in priority to other creditors of CCB - Appellants appointed receivers by High Court - Regulation 9(1)(e) Essential (Protection of Depositors) Regulations 1986 - Whether appellants (receivers) were "personally" liable for costs - Appellants were officers of Court - Leave of Court - Whether respondents should have obtained leave of Court to proceed against appellant.*

CIVIL PROCEDURE: *Whether costs in lieu of taxation permitted - Order 59 r. 9(4) Rules of the High Court 1980 - Special circumstances.*

The issues in this appeal involve the interpretation of the following regs. 13(1), (2)(a), (b), (c), (d) of the Essential (Protection of Depositors) Regulations 1986, concerning payment of costs and other priority claims out of the assets of the Co-operative Central Bank Bhd.

Held:

[1] In this case, it cannot be disputed, and as conceded by the respondent, the taxed costs is part of a judgment debt which therefore can only rank *pari passu* with other insecured liabilities.

[2] The appeal was allowed with costs of the appeal and of the Court below and that the order of the learned Judge dated 12 January 1991 that the appellants as receivers of CCB do pay the said taxed costs be set aside. Deposit of the appellants was ordered to be refunded to them.

[Appeal allowed with costs. Order of learned Judge dated 12 January 1991 set aside. Deposit ordered to be refunded to appellants.]

[**Bahasa Malaysia** Translation of Headnote]

TAFSIRAN STATUT: *Kaedah 13 Peraturan-peraturan Perlu (Perlindungan kepada Pendeposit) 1986 - Tuntutan-tuntutan prioriti (priority claims) - Aset kepunyaan CCB - Samada pihak responden harus dibayar terdahulu daripada sipiutang CCB yang lain - Perayu dilantik penerima ("receivers") oleh Mahkamah Tinggi - Kaedah 9(1)(e) Peraturan-Peraturan Perlu (Perlindungan kepada Pendeposit) 1986 - Samada perayu-perayu (penerima) secara "peribadi" menanggung liabiliti untuk kos - Perayu adalah pegawai-pegawai Mahkamah - Kebenaran Mahkamah - Samada pihak responden harus mendapat kebenaran Mahkamah untuk meneruskan tindakan terhadap perayu.*

PROSEDURE SIVIL: *Samada perayu berhak kepada satu amaun kasar kos sebagai ganti kos ditetapkan - Aturan 59 Kaedah 9(4) Kaedah-Kaedah Mahkamah Tinggi 1980 - Hal-hal keadaan khas (special circumstances).*

Isu-isu dalam rayuan ini melibatkan tafsiran Aturan-aturan seberikutnya: Aturan 13(1), 2(a), (b), (c) dan (d) Peraturan-Peraturan Perlu (Perlindungan kepada Pendapat 1986) mengenai pembayaran kos dan tuntutan prioriti yang lain dari aset Co-operative Central Bank Berhad.

Diputuskan:

[1] Dalam kes ini, tidak boleh dinafikan dan sememangnya pihak responden telah berkonsesi, bahawa kos yang ditetapkan adalah merupakan sebahagian daripada hutang penghakiman dan oleh yang demikian mestilah mengikuti prinsip "*pari passu*" dan sekedudukan dengan liabiliti-liabiliti lain yang tidak bercagar.

[2] Rayuan tersebut telah dibenarkan dengan kos rayuan dan kos Mahkamah bawah dan perintah Hakim Yang Arif yang bertarikh 12 Januari 1991 yang memerintahkan perayu sebagai penerima bagi pihak CCB membayar kos yang ditetapkan adalah diketepikan. Deposit yang dibayar oleh perayu diperintah dikembalikan kepada mereka.

[Rayuan dibenarkan dengan kos.Perintah Hakim Yang Arif bertarikh 12 Januari 1991 diketepikan. Deposit dikembalikan kepada perayu.]

Cases referred to:

Ex parte Moore, In Re Faithful [1885] 14 QBD 627 ***(cit)***
Re Maidstone Palace of Varieties Ltd [1909] 2 Ch 283 ***(cit)***
William H. Parsons & Ors. v. The Sovereign Bank of Canada [1913] AC 160 ***(cit)***
Forest Pty Ltd (Recs. & Mgrs. apptd.) v. Keen Bay Pty Ltd & Ors. 4 ACSR 107 ***(cit)***
Ex parte Leicestershire Banking Co., In Re Dale [1884] 14 QBD 48 ***(cit)***
Bacal Contracting Ltd v. Modern Engineering (Bristol) Ltd & Ors. [1980] 2 All ER 655 ***(cit)***
Re Dominion of Canada Plumbago Co. [1884] 27 Ch D 33 ***(cit)***
S & M Hotels Ltd. v. Family Housing Association [1979] CA Transcript 132 ***(cit)***
Aiden Shipping Co. Ltd. v. Interbulk Ltd [1986] 1 AC 965 ***(cit)***
Wong Pot Heng & Anor. v. Zainal Abidin Putih & Anor. [1990] 1 CLJ (Rep) 312 ***(cit)***

Legislation referred to:

Civil Law Act 1956, s. 5(1)
Companies Act 1965, s. 133
Essential (Protection of Depositors) Regulations 1986, reg. 9(1)(b), (c), (e), 9B(1), 13
Rules of the High Court 1980, O. 12, r. 4, O.28 r. 2(1), O. 59 r. 2(2), O. 59 r. 9(4)
Supreme Court Act 1981 [UK], s. 51(1)
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 50(1)

For the appellant - Cecil Abraham, (S. Suhendran with him); M/s. Saheran & Woon
For the respondent - Hira Singh; M/s. Asbir Hira Singh & Co.

JUDGMENT

Gunn Chit Tuan SCJ:

The issues in this appeal involve the interpretation of the following reg. 13 of the Essential (Protection of Depositors) Regulations 1986, (hereinafter referred to as "the said Regulation.") concerning payment of costs and other priority claims out of the assets of the Co-operative Central Bank Bhd.:

> 13(1) All proper costs, charges and expenses, costs including remuneration, of receivers and other persons appointed under these regulations shall be payable out of the assets of the deposit-taker in priority to all other claims.

(2) The proper costs, charges and expenses referred to in para. (1) shall include the following, regardless whether the same were paid personally by the receivers or the other persons referred to in para. (1) (hereinafter in this Regulation referred to as "other persons"), or were paid by such receivers or other persons out of the assets of the deposit-taker, on behalf of the deposit-taker:

(a) the remuneration (including any contributions to any employees provident fund established by, under, or by virtue of, any written law) of all persons employed by the deposit-taker, or by the receivers or the other persons, for the purpose of the business and affairs of the deposit-taker, or for the purpose of the performance of the functions, the discharge of the duties, or the exercise of the powers of the receivers or the other persons;

(b) rents, water, electricity and other utility charges of the deposit-taker;

(c) all local authority rates, quit rents, or other charges payable under or by virtue of any written law to any authority in respect of the deposit-taker's office and business premises; and

(d) all the other expenses necessarily incurred by deposit-taker, or by the receivers or the other persons, for the purpose of the business and affairs of the deposit-taker, or for the purpose of the performance of the functions, the discharge of the duties, or the exercise of the powers, of the receivers or the other persons.

The case arose in the following circumstances. On 24 April 1989, N.H. Chan J in Originating Summons No. S5-31-3640 of 1988 between Che Wan Dvpt. Sdn. Bhd. (hereinafter referred to as "the respondent") and the Co-Operative Central Bank Bhd., concerning the construction of s. 133 of the Companies Act, 1965, made an order that the Co-operative Central Bank Bhd., do return to the respondent thirty-nine documents of titles of properties charged under Charge Presentation No. 8146/86, Jilid: 2082, Folio: 21 dated 15 May 1986, together with the duplicate charge. The learned Judge also made *inter alia* a consequential order that the said bank do pay the respondent the costs of that application to be taxed by a proper officer of the Court. Execution in relation to that order of N.H. Chan J was completed to the extent that all the documents of titles have been returned to the respondent. However the costs were not agreed and were taxed and finally reviewed. At present there is an appeal as to the quantum in Supreme Court Civil Appeal No. 02-140-91, but we were informed that the costs were paid unconditionally to the respondent and allocatur fee in the sum of RM6,979 has also been made to the Court by way of stamps.

Another action was commenced more than a year later, that is, on 10 December 1990, by the respondent against Zainal Abidin Putih and Ahmad Kamal bin Abdullah Al-Yafii (receivers and managers for the Co-operative Central Bank Bhd.) (hereinafter referred to as "the appellants") by way of an Originating Summons No. R8-24-90 seeking the following orders:

1. The defendants are liable to pay the costs taxed by the Senior Assistant Registrar on 28 November 1990 pursuant to the Order of the learned Judge dated 24 April 1989 in Kuala Lumpur High Court Originating Summons No. S5-31-3640-1988.
2. The aforesaid costs be paid by the defendants out of the funds of the Co-Operative Central Bank Bhd. forthwith to Messrs Asbir, Hira Singh & Co., as solicitors for the plaintiff.
3. The costs of this application be borne by the defendants.
4. Such further or other relief as this Honourable Court may deem fit.

That second originating summons was heard by another Judge who made an order on 12 January 1991 that:

> (a) the appellants, who had been appointed as receivers of CCB on 7 March 1989 are to pay the said taxed costs in the sum of RM171,990.60 which costs had been reviewed by N.H. Chan J on 30 January 1991 in Originating Summan No. S5-31-3640 of 1988 forthwith to the respondent's solicitors.
>
> (b) the appellants are to pay the costs of this action in Court of RM6,000 as costs in lieu of taxation.

Upon the learned Judge certifying that he did not wish to hear further arguments on the matter, the appellants lodged the present appeal to the Supreme Court on 20 January 1991.

It was the contention of Mr. Cecil Abraham, leading Counsel for the appellants, that they were not the proper parties to the second originating summons as they were not a party in Originating Summons No. S5-31-3640 of 1988. He stated that the appellants, as receivers appointed by the Court, were under no personal liability and only acted in the best interests of the depositors. Counsel contended that the said Regulation dealt with the issue of priority of payments out of the assets of the Co-Operative Central Bank Bhd. and did not authorise the appellants to pay costs in priority to the respondent. He also stated that the appellants did not dispute that the respondent was entitled to costs but the main issue in this appeal was whether the respondent should be paid in priority to the other creditors of the Co-Operative Central Bank Bhd. or whether the appellants were "personally" liable for costs. It was submitted that the Court would also have to decide whether the respondent's party and party costs are "costs" within the meaning of the said Regulation amended or otherwise. Counsel however contended that the respondent's party and party costs are not costs of receivers within the meaning of the said Regulation.

Mr. Abraham then referred to the following reg. 9B(1) relating to the powers of a manager appointed by the Central Bank under reg. 9(1)(b) or a receiver appointed by the High Court under reg. 9(1)(e) of the Essential (Protection of Depositors) Regulations 1986:

> 9B(1) Subject to these Regulations, a manager may take all action as may be necessary in relation to the business, affairs and property of the deposit-taker, or for the purpose of protecting the interests of the depositors, creditors or customers, or persons having any lawful dealings or transactions with the deposit-taker, and, without prejudice to the generality of such power, the manager may, in particular, do all or any of the following:
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> (a) ...
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> (b) ...
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> (c) ...
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> (d) ...
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> (e) ...
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> (f) apply the assets of the deposit-taker which are at any time in his possession, or under his custody or control, during the course of carrying on the business of the deposit-taker or the management of the affairs and property of the deposit-taker, subject to reg. 13, to meet the deposit liabilities of the deposit-taker in preference to all other unsecured liabilities of the deposit-taker.

and contended that the costs of the respondent formed part of the judgment of N.H. Chan J and could not be separated from that sum of money. He then cited the following passage from the judgment of Brett MR in *Ex Parte Moore, In Re Faithful* [1885] 14 QBD 627 at p. 633 & 634:

> A final judgment at Common Law was always a judgment for debt or damages, and the taxed costs of the action. In such a case the costs formed part of the judgment. xxx and an order for the payment of costs when taxed, which is part of the judgment, is a final judgment for the costs. The costs when taxed are then a debt due in respect of a final judgment.

As costs awarded take on the form of a judgment debt, he contended that it therefore ranked *pari passu* with other unsecured liabilities.

Counsel then submitted that the respondent was wrong in law in not having obtained leave of the Court to proceed against the appellants who were appointed by the Court. He cited *Re Maidstone Palace of Varieties Ltd.* [1909] 2 Ch 283 as authority, and pointed out that this issue was taken up as a preliminary objection in the High Court which was overruled by the learned Judge who considered that leave was not required as he was of the view that the second originating summons was not a fresh case instituted against the receivers but was a continuation of Originating Summons No. S5-31-3640 of 1988 which was heard by N.H. Chan J Counsel submitted again before us that leave of the Court was required before the second originating summons was instituted against the appellants. He also contended that the respondent could have joined the appellants in the earlier action and obtained an order for priority for payment of their costs. They did not do so and were now estopped from taking this issue in the second originating summons.

It was also contended by Mr. Abraham that the respondent had contravened the provisions of O. 28 r. 2(1) of the Rules of the High Court 1980, read with O. 12 r. 4 of the said Rules. He said that the learned trial Judge was wrong in law in assuming that because there was a certificate of urgency the Rules of the High Court 1980, need not be complied with. It was also his contention that there was no real urgency and therefore the hearing of the second originating summons in the circumstances was premature and contrary to the Rules of the High Court in that it had deprived the appellants the right to object formally to the irregularities.

Finally, Counsel also contended that the payment of costs in lieu of taxation was only permitted in special circumstances and such special circumstances did not exist in the present appeal. He contended that there was a misconstruction of the following O. 59 r. 9(4) of the Rules of the High Court 1980:

> 9(4) The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled -
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> (a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or
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> (b) to a gross sum so specified in lieu of taxed costs.

Mr. Hira Singh, Counsel for the respondent, stated that the Co-Operative Central Bank Bhd., was declared insolvent and the appellants were then appointed as receivers. He submitted that the receivers were in fact the same party as the Co-Operative Central Bank Bhd. and cited *William H. Parsons & Ors. v. The Sovereign Bank of Canada* [1913] AC 160 and *Forest Pty. Ltd. (Recs and Mgrs apptd) v. Keen Bay Pty. Ltd. & Ors.* 4 ACSR 107 as his authorities for that submission. As regards the said Regulation, Counsel stated that Eusoff Chin J (as he then was) had held that the appellants ought to pay the costs being "the proper costs charges and expenses" to the respondent because they had incurred the liability in the process of "enforcing and protecting the Co-Operative Central Bank Bhd.'s rights." Counsel stated that he relied heavily on para. 2(d) of the said Regulation, which he contended was much wider, as it referred to "all other expenses necessarily incurred" by the receivers for

the purpose of the exercise of their powers. Finally, he referred to *Ex Parte Leicestershire Banking Company, In Re Dale* [1884] 14 QBD 48 and contended that it was authority that the costs of the respondent should be paid out of the assets of the Co-Operative Central Bank Bhd. and that payment of its costs was entitled to priority.

After we heard this appeal on 10 and 11 February 1992, Mr. Hira Singh sent us a further written submission which he considered would throw further light on the issues before us. In his further submission, Counsel stated that the authorities relevant to liability for costs in legal proceedings affecting receivers were reviewed by His Honour Judge Fay QC when sitting as an official referee in *Bacal Contracting Ltd. v. Modern Engineering (Bristol) Ltd. & Ors.* [1980] 2 All ER 655. Counsel drew our attention to that part of His Honour's judgment where he referred to the judgment of Pearson J in *Re Dominion of Canada Plumbago Co.* [1884] 27 Ch D 33, when His Lordship described it as "monstrously unfair" to treat a successful litigant as an unsecured creditor for his costs. Our attention was also drawn to another passage in His Honour's judgment where reference was made to a transcript of the judgment of the UK Court of Appeal in *S & M Hotels Ltd. v. Family Housing Association* [1979] CA Transcript 132. According to the transcript records of that case, Counsel for the successful defendant asked for costs to be paid by the receiver as part of the expenses of the receivership, whereupon Buckley LJ said to Counsel for the plaintiffs who was disposed to agree that was the right order but added that he was not sure that he was instructed to oppose it:

> Whether you are instructed either to oppose or assent it seems to me that the order proposed by Counsel for the defendant is the right order.

Lord Templeman LJ agreed and His Honour Judge Fay QC said as follows:

> But where I find Buckley and Templeman LJJ agreeing that it is possible to make such an order I regard their action as persuasive authority of weight, and I propose to follow them.

In that case, the learned Judge Fay QC held firstly that the Court had the power in suitable circumstances to order a debenture holder's receiver to pay costs incurred after the commencement of a compulsory winding-up, and secondly that it was just and equitable that the receiver be allowed such costs as part of his receivership expenses.

Mr. Hira Singh submitted that from the authorities cited by him the general law is clear and that a successful litigant is entitled to be paid costs of the action continued by a receiver in priority to other unsecured creditors. Counsel also stated that it was clear that the action in the present appeal was funded by Bank Negara which had pumped millions of dollars into the Co-Operative Central Bank Bhd. He then referred to *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] 1 AC 965 which, according to him, was authority that a Court had jurisdiction and power to make an order that a third party which is funding litigation may be ordered to pay the costs of the litigation. Mr. Hira Singh then suggested that this Court might consider it appropriate that Bank Negara should pay the costs of the litigation as an alternative to the order made by Eusoff Chin J (as he then was).

Counsel then pointed out that the said Regulation was amended by PU(A) 274/91 dated 26 July 1991, by the addition of the above-quoted para. (2) of the said Regulation. He contended that the legislature under the Emergency (Essential Powers) Act 1979, and the Essential (Protection of Depositors) Regulations 1986, has not expressly taken away the jurisdiction and power of the Court to award costs of litigation to a successful litigant.

Mr. Hira Singh finally referred to para. 2(d) of the said Regulation a second time and submitted again that the words "all other expenses" were extremely wide as to encompass the costs of litigation. He also referred to the words "necessarily incurred" and contended that those words would encompass expenses incurred by the Co-Operative Central Bank Bhd. but exclude expenses incurred unnecessarily. He said, however, that in this case the costs of the litigation was necessary to enforce and protect the rights of the Co-Operative Central Bank Bhd. and to manage the affairs and the indefeasible proprietary interests of the said bank in the lands secured by the said Charge.

Mr. Abraham also sent us a reply to Mr. Hira Singh's further written submission. He referred to and reminded us of this Court's decision on *Wong Pot Heng & Anor. v. Zainal Abidin Putih & Anor.* [1990] 1 CLJ (Rep) 312, 320, in which this Court has stated that where there is an express statutory provision relating to priority of payment, common law principles as set out in decided cases cannot apply and that apart from the specified liabilities set out in reg. 13 of the Essential (Protection of Depositors) Regulations 1986, all other liabilities have no priority and therefore must rank equally.

Counsel then sought to distinguish the cases cited by Mr. Hira Singh. He pointed out that in *Bacal Contracting Ltd. v. Modern Engineering (Bristol) Ltd. & Ors.* [1990] 2 MLJ 410, 414, the receiver appointed by debenture holders had continued acting after the company had been compulsorily wound up and the Court therefore ordered him to pay the defendant's costs provided he had recourse to the debenture holders for the said costs. Counsel contended that it was important to bear in mind that in the cases cited by Mr. Hira Singh, it was held that the Courts in the United Kingdom did indeed have a discretion to decide by whom and to what extent costs are to be paid. He referred to s. 51 of the UK Supreme Court Act 1981, which gives the Court there full power to determine by whom and to what extent the costs are to be paid and contended that those cases cited by Mr. Hira Singh therefore had no relevance as our Courts in this instance were not exercising a discretionary power as we do not have provisions equivalent to s. 51 of the UK Supreme Court Act of 1981 in our Essential (Protection of Depositors) regs. 1986, as amended in 1991.

Mr. Abraham then referred to and reiterated that the only question before this Court was therefore that of the construction of the said Regulation. He also referred to sub-paragraph 2(d) of the said Regulation and pointed out that it referred to "expenses" and was silent on the question of proper costs and charges and contended that the dispute in this case was whether the costs awarded against the appellants are to be considered part of the expenses or are to be considered as a judgment debt. Finally, Counsel submitted again that costs formed part of the judgment debt and as such the respondent's right of recovery should rank with that of all other judgment creditors and could not be considered as ranking *pari passu* with the expenses of the receiver.

We would start off by pointing out that the appellants were appointed receivers by the Court and are therefore first and foremost officers of the Court, and to use the words of Viscount Haldane LC in *William H. Parsons & Ors. v. The Sovereign Bank of Canada* [1913] AC 160 "put in to discharge certain duties prescribed by the order appointing him". In the present case, the appellants were appointed by the High Court under sub-paragraph (c) of para. 1 of reg. 9 of the Essential (Protection of Depositors) Regulation 1986, which reads as follows:

> 9(1)(c) ... to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;

The deposit-taker in this case, that is, the Co-Operative Central Bank Bhd., remains in existence but has lost its title to control its assets and affairs. As the appellants were appointed by the Court and are responsible to it and cannot obey the directions of the parties in the action, they do not stand in the position of agents to the parties who are interested at the suit of whom they are appointed (*Bacup Corpn. v. Smith* [1890] 44 Ch D 395 per Chitty J). But the important point in this case was that as the appellants are officers of the Court, leave of the Court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties, Ltd.* [1909] 2 Ch 283 was correctly cited by Counsel for the appellants in support of his submission that leave of the Court was necessary. Unfortunately the preliminary objection of Counsel in the lower Court was overruled by the learned Judge for if His Lordship had upheld that preliminary objection, then the further prosecution of the second originating summons should have been restrained and dismissed with costs if leave was not obtained.

However the learned Judge proceeded to hear the second originating summons and ordered the appellants to pay the taxed costs in Originating Summons No. S5-31-3640 of 1988 forthwith to the respondent's solicitors. And the main issue therefore arises as to whether the said Regulation empowered the Court to have made the order that the respondent's costs be paid in effect in priority to the other creditors of the Co-operative Central Bank Bhd.

It must be noted that the costs ordered by N.H. Chan J in Originating Summons No. S5-31-3640 of 1988 were costs ordered against the Co-Operative Central Bank Bhd., itself and not against the appellants. As such, the said costs were not costs contemplated by the said Regulation and were not incurred by the appellants as receivers. However according to sub-paragraph (d) of para. (2) of the said Regulation, the proper costs, charges and expenses referred to in para. (1) shall include "all other expenses necessarily incurred by the deposit-taker or by the receivers". We have noted that although the said Regulation has stated that the proper costs etc shall include "all other expenses necessarily incurred", we consider that as the expressions "costs" and "all other expenses" are used in the same Regulation, it is clear that the expression "all other expenses" cannot therefore include or mean "costs". We agree with Mr. Hira Singh that para. (2) is wider than para. (1) of the said Regulation as it includes "the other expenses" of the deposit-taker, that is, the Co-Operative Central Bank Bhd., as well as those of the receivers. But para. (1) of the said Regulation only gives priority to costs, including party and party costs, of receivers and other persons appointed under the Regulations and does not give priority to the other expenses, which do not include costs, of the deposit-taker, that is the Co-Operative Central Bank Bhd.

Although we do not have statutory provisions in this country similar to those in s. 51(1) of the UK Supreme Court Act 1981, which gives a discretionary power to their Courts there to award costs [see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] 1 AC 965], s. 5(1) of our Civil Law Act 1956, which allows the application of English law in commercial matters, reads as follows:

> 5(1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

and it would appear that on and after 7 April 1956, when the Civil Law Act 1956, came into force in West Malaysia, the Courts here could have followed English decisions such as *Bacal Contracting Ltd. v. Modern Engineering (Bristol) Ltd. & Ors.* [1980] 2 All ER 655, which applied the following s. 50(1) of the UK Supreme Court of Judicature (Consolidation) Act 1925, regarding discretion given to Courts there to award costs:

> Subject to the provisions of this Act and to rules of Court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs are to be paid.

However, reference should be made to item 15 of the Schedule to the Courts of Judicature Act 1964, and O. 59 r. 2(2) of the Rules of the High Court 1980, which give a discretionary power to the High Court in this country to grant costs.

We would agree therefore that *Bacal Contracting Ltd. v. Modern Engineering (Bristol) Ltd. & Ors.* [1980] 2 All ER 655 is a modern illustration of the general principle that Courts could use the sanction of an adverse order in costs against a receiver. But our present case was not one in which the appellants, as receivers, had caused unnecessary proceedings or litigious expenses. In the first originating summons, it was the respondent that had brought the action against the Co-Operative Central Bank Bhd. In the second originating summons, it was again the respondent that had taken the action against the appellants. Therefore it was not the appellants, as receivers, who had by their misconduct made any unnecessary application to Court for the Court to exercise its discretion to make an adverse order against them.

Moreover it must be observed that the above-quoted s. 5(1) of the Civil Law Act 1956, specifically provides that the general principles of law do not apply if "in any case other provision is or shall be made by any written law". And in this case, this Court has pointed out in *Wong Pot Heng & Anor. v . Zainal Abidin Putih & Anor.* [1990] 2 MLJ 410, 414 that "When there is an express statutory provision relating to priority, we cannot displace or improve it by resorting to decided cases of common law jurisdiction unless there is a *lacuna* or ambiguities in our law. We totally reject the argument of Counsel for the appellants that decided cases by other common law jurisdictions which he describes as 'common law principles' should apply on the issue of priority in the present dispute, notwithstanding reg. 13." (per Azmi SCJ). Whether the said Regulation is "monstrously unfair" to a successful litigant, such as the respondent, is not for us to decide and our Courts in this case can only construe and apply the specific legislation passed for the protection of depositors regarding priority for payment of costs. And in this case it cannot be disputed, and as conceded by the respondent, the taxed costs is part of a judgment debt which therefore can only rank *pari passu* with other unsecured liabilities.

Finally we note that there was cause for complaint by the appellants that there has been contravention of certain rules of the High Court but it is unnecessary for us to consider the effect of such non-compliance of those rules as there are sufficient reasons, which we have stated above, which require us to allow this appeal. We therefore order that the appeal be allowed with costs here and below and that the order of the learned Judge dated 12 January 1991, be set aside. The deposit of the appellants should also be refunded to them.

Also found at [1992] 3 CLJ 1539

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